Supreme Court, U.S.
FILED
JUN 9 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1624

In the Supreme Court of the United States

OCTOBER TERM, 1985

DAVID M. ROSENFIELD, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

CHARLES FRIED
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

TABLE OF AUTHORITIES

Page

Cases:

Brady v. *Maryland*, 373 U.S. 83 ..... 5, 7, 8

United States v. *Ferri*, 778 F.2d 985 8

United States v. *Mechanik*, No. 84-1640 (Feb. 25, 1986) 6, 7

United States v. *Navarro-Ordas*, 770 F.2d 959, cert. denied, No. 85-1086 (Feb. 24, 1986) 7

United States v. *Serubo*, 604 F.2d 807 ..... 5, 7

Wisniewski v. *United States*, 353 U.S. 901 8

Statutes and rule:

18 U.S.C. 1503 1

18 U.S.C. 1341 1

18 U.S.C. 1962(c) 1

18 U.S.C. 1962(d) 1

Fed. R. Crim. P. :

Rule 6 ..... 4, 6

Rule 6(e) 5

Rule 6(e)(2) 3, 4, 6, 7

Rule 52(a) 6

In the Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-1624

DAVID M. ROSENFIELD, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that his conviction should be reversed on the grounds that there was a breach of grand jury secrecy and that the government failed to disclose exculpatory *Brady* material.

1. a. Following a jury trial in the United States District Court for the Eastern District of Pennsylvania, petitioner was convicted on one count of conducting the affairs of an enterprise through a pattern of racketeering activity, in violation of 18 U.S.C. 1962(c); one count of conspiring to commit that offense, in violation of 18 U.S.C. 1962(d); one count of obstructing justice, in violation of 18 U.S.C. 1503; and 34 counts of mail fraud, in violation of 18 U.S.C. 1341. He was sentenced to a total of six and one-half years' imprisonment and ordered to forfeit his interest in the enterprise—his law firm. Pet. App. 7a. The court of appeals affirmed (*id.* at 6a-10a).

The evidence at trial, the sufficiency of which is not challenged, showed that petitioner, an attorney, was a principal in a scheme to use his law firm to file fraudulent automobile insurance claims involving millions of dollars. Petitioner and William Mele, the legal administrator of the firm, hired people called "runners" to stage phony automobile accidents and to direct the "victims" to petitioner's firm. Once the "victims" were retained as clients on a 50% contingency fee basis, petitioner reviewed their files to determine how much to pay the "runner." After the "victims" were referred to physicians who were also involved in the scheme, phony medical records were compiled, and bogus insurance claims were filed. Between 1979 and 1982, the scheme generated over $4 million in fees for petitioner's firm, of which petitioner personally received at least $1.6 million. After the federal investigation began, petitioner destroyed records of payments he had made to confederates in connection with the operation. C.A. App. 721-732, 757-770, 1104-1106, 1167-1181, 1321-1329, 1437-1441, 1510-1512, 1643-1647, 1682-1693.[1]

b. The federal investigation was begun when John Hoda, an agent of the Insurance Crime Prevention Institute, alerted authorities to petitioner's scheme. Hoda then assisted Postal Inspector James Trovarello in the investigation. As the court of appeals noted (Pet. App. 7a-8a):

> Hoda's principal role was to identify copies of insurance files that were of interest to the investigation, and to deliver them to Trovarello. In addition, Hoda was present, or waiting in the car, when 36 grand jury

---

[1]Mele and Elliot Raskin, an associate in petitioner's firm, were convicted at separate trials and testified for the government at petitioner's trial. Numerous other individuals involved in the scheme, including "runners" and physicians, were charged in several separate indictments and convicted.

> subpoenas were served by postal inspectors, thus enabling him to learn the identity of grand jury witnesses. Hoda was also present when some 37 people were interviewed by postal inspectors. In about ten of these instances, * * * the interview took place after the person had complied with a grand jury subpoena demanding handwriting examples and fingerprints, and in approximately five or six of these instances, the person's statement was subsequently summarized to the grand jury.

Prior to trial, petitioner moved for dismissal of the indictment on the ground that Hoda's participation in the investigation provided him with grand jury information and thus violated the secrecy of the grand jury under Fed. R. Crim. P. 6(e)(2). After a hearing, the district court denied petitioner's motion (Pet. App. 1a-5a). The court first found that there was no evidence that "what occurred before the grand jury was in fact disclosed to Mr. Hoda * * *. Mr. Trovarello never * * * told Mr. Hoda anything [that] occurred before the grand jury, so there is no direct disclosure" (*id.* at 2a). The court also held that Hoda's presence when grand jury subpoenas were served, from which he learned the identities of prospective grand jury witnesses, did "not represent a disclosure under the facts of this case" since Hoda was "the person who sought on behalf of his client to initiate an investigation and to have supplied the government with the names of persons involved in potential mail fraud" (*id.* at 2a-3a). However, the court concluded that a "greater problem[]" (*id.* at 3a) arose from Hoda's presence at the interviews of witnesses who had been subpoenaed to furnish handwriting or fingerprint exemplars (*ibid.*):

> [T]he interviews * * * were not taken pursuant to subpoenas to appear for testimony to the grand jury * * *. If at the time the interview was actually taken there was

> no belief or intention to submit the material to the grand jury, I would think that it would merely be a part of the investigative process and that there would be no disclosure under the rule. However, it appears to me that at the time the persons were interviewed there was certainly a reasonable basis for belief that these matters would be summarized to the grand jury and in that regard Mr. Hoda indeed became knowledgeable of information which had the potential for being brought before the grand jury, and I believe that that would constitute a disclosure of matters occurring before the grand jury.

Even though it believed that disclosure had occurred in this respect, the district court concluded that the remedy of dismissal was not appropriate. The court found that "[c]ertainly there is no evidence of record in this case that there is any prejudice whatsoever to [petitioner], so that there is no basis for dismissal of the indictment because of prejudice to [petitioner]" (Pet. App. 3a). In addition, the court determined that "such drastic action as dismissal is [not] necessary to prevent any future grand jury abuse. * * * To the extent that the interview process [used by the postal inspector] constitutes an impermissible disclosure, it's clear that I should be able to call the matter to the attention of the United States Attorney and that corrective action could be taken short of dismissal of the indictment" (*id.* at 4a).

c. On petitioner's appeal following his conviction at trial, the court of appeals affirmed the district court's ruling denying the motion to dismiss the indictment (Pet. App. 6a-10a). The court of appeals found it unnecessary to resolve the government's contention that Hoda's presence during the interviews did not constitute disclosure under Fed. R. Crim. P. 6(e)(2) because the interviews had not occurred before the grand jury (Pet. App. 8a). Instead, the court held that, even assuming Rule 6 had been violated, the

remedy of reversal of the conviction and dismissal of the indictment was not warranted.

Under Third Circuit precedent, "[a]n abuse of the grand jury by the prosecution merits dismissal of the indictment only where the defendant is actually prejudiced, or '[t]here is evidence that the challenged activity was something other than an isolated incident unmotivated by sinister ends or that the type of misconduct challenged has become entrenched and flagrant in the circuit' " (Pet. App. 8a (bracket in original), quoting *United States* v. *Serubo*, 604 F.2d 807, 817 (1979)). In this case, the court noted, petitioner did not contest the district court's finding that the Rule 6(e) violation, if any, did not prejudice him in any way (Pet. App. 9a). The court also noted that there was no evidence "that the alleged disclosures were motivated by sinister ends, or are ' "entrenched and flagrant' in the circuit." At worst, a postal inspector—and not the assistant United States attorney—erred in sharing too much information with an investigator from a private organization" (*ibid.* (citation omitted)). However, while affirming petitioner's conviction, the court "reaffirm[ed] the importance of maintaining grand jury secrecy" and "caution[ed] prosecutors and government investigators against future transgressions." The court added that "[f]uture lapses should they become routine or * * * arguably prejudicial to individual defendants, will be examined with close scrutiny." *Ibid.*

Petitioner also argued that the government failed to disclose exculpatory materials under *Brady* v. *Maryland*, 373 U.S. 83 (1963), and that a remand to the district court was needed to resolve that issue. The government's brief (at 18-20) demonstrated that petitioner had failed to substantiate his claim and that his allegations were unfounded. The court of appeals concluded that "there is no merit" to petitioner's contention (Pet. App. 10a) and held that a remand was unnecessary.

2. This Court's recent decision in *United States* v. *Mechanik*, No. 84-1640 (Feb. 25, 1986), forecloses petitioner's contention that his conviction should be reversed because of the alleged breach of grand jury secrecy. In *Mechanik*, the Court held that the harmless error standard of Fed. R. Crim. P. 52(a) applies to violations of Fed. R. Crim. P. 6 and that a petit jury's verdict following an error-free trial renders it inappropriate to set aside a conviction because of defects in the grand jury process. As the Court explained (slip op. 5, 7 (footnote omitted)):

> [T]he petit jury's subsequent guilty verdict not only means that there was probable cause to believe that the defendants were guilty as charged, but that they are in fact guilty as charged beyond a reasonable doubt. Measured by the petit jury's verdict, then, any error in the grand jury proceeding connected with the charging decision was harmless beyond a reasonable doubt.
>
> * * * * *
>
> We hold * * * that however diligent the defendants may have been in seeking to discover the basis for the claimed violation of Rule 6(d), the petit jury's verdict rendered harmless any conceivable error in the charging decision that might have flowed from the violation. In such a case, the societal costs of retrial after a jury verdict of guilty are far too substantial to justify setting aside the verdict simply because of an error in the earlier grand jury proceedings.

Mechanik is controlling here and requires affirmance of petitioner's conviction. Indeed, the harmlessness of the error in this case is clear: petitioner does not even assert that the alleged violation of Rule 6(e)(2) resulted in prejudice to him at trial or, for that matter, in the grand jury

proceeding, and both courts below found that there was no such prejudice.[2]

Furthermore, even apart from the decision in *Mechanik*, an alleged breach of grand jury secrecy would not entitle a defendant to dismissal of an indictment or reversal of a conviction. As discussed in our brief in *Mechanik* (at 28-29), the rules of grand jury secrecy serve a number of purposes designed to promote the effective operation of the criminal justice system and to protect innocent suspects who are investigated but not charged by the grand jury. A defendant who has been indicted and convicted has no personal stake in those policies that would entitle him to raise a violation of Rule 6(e)(2) as a basis for dismissal or reversal. See *United States* v. *Navarro-Ordas*, 770 F.2d 959, 968 (11th Cir. 1985), cert. denied, No. 85-1086 (Feb. 24, 1986).

3. Although he had not raised the issue in the district court, petitioner argued on appeal that the government failed to disclose exculpatory *Brady* material at trial. He now contends that the court of appeals erred in not remanding this issue to the district court.

---

[2]The court of appeals indicated (Pet. App. 8a) that under *United States* v. *Serubo*, 604 F.2d 807, 817 (3d Cir. 1979), a court has supervisory power to dismiss an indictment even in the absence of prejudice to the defendant if the alleged misconduct was " 'something other than an isolated incident unmotivated by sinister ends or * * * has become entrenched and flagrant in the circuit.' " However, as we argued in our brief in *Mechanik* (at 40-44 & n.56), a copy of which is being sent to counsel for petitioner, and as the Court's decision in *Mechanik* reflects, the remedy of dismissal is inappropriate if the alleged defect in the grand jury did not prejudice the defendant. In any event, the court of appeals correctly held (Pet. App. 9a) that dismissal was not warranted under *Serubo* because the asserted violations of Rule 6 were neither "motivated by sinister ends" nor " ' "entrenched and flagrant" in the circuit.' "

Petitioner's claim is insubstantial and does not warrant this Court's review. As explained above, the government's brief in the court of appeals showed that petitioner had failed to support his allegations and that no *Brady* violation had been established. In these circumstances, the court of appeals correctly concluded (Pet. App. 10a) that "there is no merit" to petitioner's contention and that a remand was necessary.[3]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

JUNE 1986

---

[3]Petitioner asserts that in declining to remand the case, the court of appeals failed to follow its earlier decision in *United States* v. *Ferri*, 778 F.2d 985, 997 (3d Cir. 1985). Of course, a claim that a court of appeals has departed from its own precedents provides no basis for review by this Court. See *Wisniewski* v. *United States*, 353 U.S. 901 (1957). In any event, the defendant in *Ferri*, in contrast to petitioner, presented independent evidence to support his argument that the documents in question were both exculpatory and material and that the government had knowingly suppressed them.